

STATE OF MICHIGAN
COURT OF APPEALS

GERALD GIVEN,

Plaintiff/Counter-Defendant-
Appellant,

v

WAGERSON & ASSOCIATES,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

April 15, 2003

No. 238101

Oakland Circuit Court

LC No. 1999-018106-CK

Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted the trial court's order granting in part and denying in part defendant's motion for summary disposition. We remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant is a manufacturer's representative and acts as an agent for manufacturers of parts used in the automotive industry. Plaintiff worked for defendant as a representative. The parties agreed that plaintiff was to be paid a commission based on sales of manufacturer's parts to the automotive industry. Plaintiff's monthly draw and expenses were to be deducted from the commissions, and the balance would be split between the parties. Subsequently, defendant altered the agreement and began paying plaintiff a straight salary. Plaintiff objected, and shortly thereafter his employment was terminated.

Plaintiff filed suit alleging that pursuant to the parties' agreement he was to be paid fifty percent commissions on all business that he generated. Plaintiff alleged that defendant did not pay him the commissions to which he was entitled on the Tompkins Products, Indo Swiss Time (IST), and Maini Precision accounts. Plaintiff alleged breach of contract, fraud and misrepresentation, and additional damages based on defendant's failure to make contributions to a retirement fund. Defendant filed a countercomplaint alleging unjust enrichment.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant asserted that initially the parties agreed that plaintiff would be paid fifty percent commissions on new business that he generated, and thirty percent commissions on existing accounts that he serviced. Defendant argued that under the "procuring cause" doctrine as set out in *Kuzin v A & J Precision Tool Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March

30, 2001 (Docket No. 217895), plaintiff could not prevail on his claim that he was entitled to commissions on business generated by his efforts. The procuring cause doctrine provides that an agent is entitled to recover commissions if his efforts were the procuring cause of a sale, even if he did not personally complete the sale. *Id.*, slip op at 5. Defendant asserted that no evidence showed that plaintiff played any role in securing accounts with Tompkins, IST, or Maini. In response, plaintiff argued that a dispute existed as to whether he was to be paid fifty percent commissions on all accounts, or whether he was to be paid fifty percent commissions on accounts he procured and thirty percent commissions on existing accounts that he serviced.

The trial court granted defendant's motion in part and denied it in part. The trial court found that while no evidence showed that plaintiff was the procuring cause of new business in connection with the IST and Maini accounts, a genuine issue of fact existed as to whether plaintiff was the procuring cause of new business in connection with the Tompkins account. The trial court concluded that plaintiff was entitled to thirty percent commissions on the IST and Maini accounts, and that a question of fact existed as to the amount of the commissions he was due on the Tompkins account.

Defendant moved for reconsideration, arguing that the Tompkins account consisted of two parts, one related to GM Powertrain and the other related to Allison/Delphi, and that no evidence established that plaintiff was the procuring cause of new business in connection with the GM Powertrain portion of the account. The trial court granted defendant's motion, and found that because a question of fact existed as to whether plaintiff was the procuring cause of new business in connection with the Allison/Delphi portion of the account, a question of fact existed as to whether he was entitled to commissions of thirty percent or fifty percent in connection with that portion of the account.

Plaintiff moved for reconsideration. The trial court denied the motion. Subsequently, the trial court stayed proceedings pending resolution of plaintiff's interlocutory appeal to this Court.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). In deciding a motion for summary disposition brought pursuant to MCR 2.116(C)(10), a trial court may not make findings of fact or weigh credibility. *Nesbitt v American Comm Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition in part. Plaintiff contends that at a minimum an issue of fact existed as to the rate of commissions to which he was entitled, and that the trial court erred as a matter of law by finding that he was entitled to thirty percent commissions on accounts he serviced and fifty percent commissions on accounts he procured.

We remand for further proceedings consistent with this opinion. The parties agreed that plaintiff was entitled to commissions on all accounts on which he worked, regardless of whether he procured or merely serviced the account. However, they disagreed as to the rate of commissions to which plaintiff was entitled. Defendant contended that plaintiff was entitled to thirty percent commissions on accounts he serviced and to fifty percent commissions on accounts he procured. Plaintiff asserted that he was entitled to fifty percent commissions. At no point did

plaintiff allege that he was to be paid thirty percent commissions on accounts that he did not procure.¹

In making its initial ruling on defendant's motion for summary disposition the trial court seemingly accepted defendant's representation that plaintiff was entitled to thirty percent commissions on accounts he serviced and fifty percent commissions on accounts he procured. The trial court then relied on the discussion in *Kuzin, supra*, regarding the procuring cause doctrine² and found that plaintiff did not procure certain accounts. The trial court concluded that plaintiff was entitled to thirty percent commissions on those accounts. In determining that plaintiff was entitled to thirty percent commissions on the accounts he serviced and to fifty percent commissions on the accounts he procured, the trial court either mistakenly concluded that the parties did not disagree on this issue, or erroneously made a finding of fact on the issue. *Nesbitt, supra*. We remand this matter with instructions that the trial court determine if a genuine issue of fact existed as to whether the rate of commissions to which plaintiff was entitled depended on whether he procured or merely serviced the account, and enter an appropriate order based on its decision.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

¹ In its brief defendant states that in his deposition plaintiff made such a statement. A review of the deposition pages cited by defendant reveals no such statement by plaintiff.

² The trial court did not state that it was bound by *Kuzin, supra*. The trial court found the explanation of the procuring cause doctrine in *Kuzin, supra*, to be instructive in analyzing defendant's argument. A court is entitled to conclude that the reasoning of an unpublished decision is persuasive. *Steele v Dep't of Corrections*, 215 Mich App 710, 714 n 2; 546 NW2d 725 (1996).